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Dean C. Shriber v. Department of Employment Security : Reply Brief

Utah Court of Appeals

Emma R. Thomas, K. Allan Zabel; Attorneys for Respondent.
David L. Grindstaff; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

DEAN C. SHRIBER, Petitioner, vs. DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	)	CP No: 960295-CA Priority No: 7

REPLY BRIEF OF THE PETITIONER

AN APPEAL FROM THE DENIAL OF AN APPEAL FOR THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH

David L. Grindstaff #4043
431 South 300 East, Suite 302
Salt Lake City, UT 84111
Telephone: (801) 363-1370
Attorney for Petitioner

Emma R. Thomas
K. Allan Zabel
Attorneys for Respondent
Board of Review of the Industrial Commission
Department of Employment Security
140 East 300 South
P.O. Box 45244
Salt Lake City, UT 84145-0244

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

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I. DISCUSSION

I. CLAIMANT DID NOT RECEIVE A FAIR HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE

Respondent argues "[t]his Court has previously defined a fair hearing in the context of the unemployment compensation program." Resp't's Br. at 9. In support of its argument, Respondent cites to Nelson v. Department of Employment Security, 801 P.2d 158, 163 (Utah App. 1990), for the general rule that "'[w]hile [this Court has] recognized the importance and necessity of preserving fundamental requirements in administrative hearings, administrative hearings need not possess the formality of judicial proceedings.'" Resp't's Br. at 9-10 (quoting Nelson, 801 P.2d at 163) (bracket inserted). For additional support, Respondent again cites to Nelson to show this Court found Nelson received a fair hearing because even though she appeared pro se, she had ample opportunity to present her story and cross-examine adverse witnesses. Id. at 10 (citing Nelson, 801 P.2d at 163). Respondent further cites to Nelson to show this Court found a fair hearing resulted because, "'The ALJ, in fact, questioned the employer's witnesses in order to bring out Ms. Nelson's side of the story. Ms. Nelson expressed no confusion, nor did she request assistance at the hearing.'" Id. (quoting Nelson, 801 P.2d at 163).

The instant matter is distinguishable from Nelson. What is deemed a "fair hearing" in one hearing does not necessarily apply in the next instance, unless the facts and the procedures are similar. Here, the facts and procedures are dissimilar. This is because Nelson did not deal with the request for and the denial of the statutorily mandated issuance of subpoenas, when requested by a party, at the outset of the hearing process Accordingly, Nelson is dissimilar to the instant matter and, as such, does not support Respondent's argument.

Respondent also argues that "administrative hearings need not possess the formality of judicial proceedings." Nelson, 801 P.2d at 163. Claimant does not dispute this. However, Claimant does dispute what Respondent cites as the major theme of the passage it cites from Nelson, see Resp't's Rpy. at 9-10. Claimant is not asserting he was involved in a judicial proceeding. Such an assertion is immaterial to this matter. The relevant theme from Respondent's cited passage is "the importance and necessity of preserving [the] fundamental requirements of procedural fairness in administrative hearings[.]" Nelson, 801 P.2d at 163 (bracket inserted).

One such fundamental procedural requirement for the preservation of administrative hearings is the issuance of subpoenas when requested by a party. If fact, by statute, it is

a procedure which is required, not discretional. See Utah Code Ann. § 63-46-7(2) (1987) ("S]ubpeonas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party[.]").

If the Legislature did not feel that in order to preserve the "procedural fairness" of administrative hearings by the mandatory issuance of subpoenas, then the Legislature would not have placed the mandatory requirement of the issuance of subpoenas, when requested by a party, upon the ALJ. The Legislature would have left it to his or her arbitrariness or discretion, or both. However, this is not the case. Therefore, it is reasonable to conclude that the Legislature's mandatory requirement of the issuance of subpoenas when a party so requests was put in place to ensure that "procedural fairness" in administrative hearings will thereby be achieved, which, in turn, will maintain "the importance of procedural fairness in administrative hearings." E.g., Nelson, 801 P.2d at 163.

Procedural fairness loses all significance when a party requests a subpoena be issued whereby his or her hearing will be fair, however, said request is denied. The ultimate arbitrary denial of such a request will inevitably always prejudice a party.

II. THE ALJ'S FAILURE TO ISSUE SUBPOENAS IN THIS CASE DID CONSTITUTE REVERSIBLE ERROR

Claimant agrees with Respondent's analysis of Shively v. Stewart, 421 P.2d 65, 68 (CA. 1967). Respondent states "[a] California case involving a similar provision in the California Administrative Proceedings Act says that because of the phrase of law 'shall' issue, the issuance is a ministerial act, and the ALJ has no discretion." Resp.t's Rpy at 13. (citing Shively, 421 P.2d at 68).

That case involves the same process which applied to the Claimant. Here, Claimant sought the issuance of subpoenas, but was denied by the ALJ.[1] Resp't's Reply at 12. In Shively, "[s]ection 11510 of the Government Code provide[d] that on proper application before the hearing subpoenas 'shall issue,' and whether the subpoenas are sought for the production of evidence of to secure prehearing discovery, their issuance is a ministerial act to which the agency or the hearing officer has no discretion." 421 P.2d at 68 (brackets inserted). This is the same argument Claimant advanced.

Claimant argued that the use of the word "shall" placed a substantive limitation on an ALJ's discretion with respect to the

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[1]Both parties agree there was a request made by the Claimant for the issuance of subpoenas, but his request was declined by the ALJ.

issuance of subpoenas. Claimant's Opening Br. at 12. And, based on this, Claimant's due process rights were violated and, therefore, this matter should be remanded back to the agency. Id. Claimant further argued he had been denied due process when there has been an abuse of discretion in the manner the ALJ conducts his proceeding. See id.

K-Mart Corp. v. Industrial Com'n of Arizona, 679 P.2d 559 (Ariz. App. 1984)[2] also supports Claimant's argument. In K-Mart, the Court stated that "this rule permits the administrative law judge to deny a subpoena request 'only when the requested statement if not forthcoming or where it is clearly shown in the statement itself that the solicited testimony would not be material and necessary." Id. at 561 (citing Reinprecht v. Industrial Commission, 550 P.2d 654, 657 (1976)). The Court thus concluded that if Reinprecht is applied literally, the administrative law judge was absolutely required to issue the subpoenas." Id. Similarly, a literal reading of § 63-46-7(2) leads to the same conclusion, "the administrative law judge was absolutely required to issue the subpoenas." K-Mart Corp., 679 P.2d at 657.

Claimant asserts that if an ALJ is left with an arbitrary choice to issue or not issue subpoenas, then his or her decision

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[2]Cited and addressed in Resp't's Br. at 13.

will have a prejudicial impact on a hearing's outcome. This is because an ALJ is left with an arbitrary decision of which witness(es) any given party should or should not call in order to assist in the determination of the cause at hand. However, an ALJ's role in these administrative hearings is to determine whether or not there was just cause for the termination of an individual, not which witness(es) may or not assist in that determination. Each party knows who will or will not assist in that process and, in fact, these decisions are left for each party to decide, not an ALJ.

An ALJ should proceed with and always maintain a neutral role in these matters. Put another way, he or she must remain objective. However, when he or she refuses to issue subpoenas at the outset of any hearing, then the scales of justice are tilted toward a subjective belief and as a result, prejudices occurs because it appears as though an ALJ has already decided what he or she must wait to decide.

Finally, the K-Mart Corp Court also concluded that the administrative judge found that the administrative law judge abused his discretion. A similar finding should be found in the instant matter.

Respondent's final argument is that "an appellate court may grant relief only 'if it determines that a person seeking

judicial review has been substantially prejudiced." Resp't's Br. at 15 (quoting Cache County v. Tax Commission, 296 Adv. Rep. 33, 39 (Utah 1996) (quoting Utah Code Ann. § 63-46-16(4))). "'In other words, we must be able to demonstrate that the alleged error was not harmless. Thus, the aggrieved party must be able to demonstrate how the agency's action has prejudiced it.'" Cache County, 296 Adv. Rep. at 39 (citations omitted).

"Substantially prejudiced" quoted in Cache County relied upon the language stated in § 63-46-16(4). Respondent misreads Cache County and what is meant in § 63-46-16(4). Section 63-46-16(4), in pertinent part reads: "The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial relief has been substantially prejudiced by any one of the following." Id. These include, but are not limited to: "(d) the agency has erroneously interpreted or applied the law; (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure[.] Id.

With respect to subsection (d), this is what Claimant is asserting, i.e., the ALJ erred in his interpretation and application of § 63-46-7(2) when he denied Claimant's request for the issuance of subpoenas.

Regarding subsection (e), similarly, Claimant asserted both, the ALJ engaged in an unlawful procedures and he failed to follow prescribed procedure when he denied Claimant's request for subpoenas. By failing to issue subpoenas, Claimant "was [denied] his fundamental right to present witnesses and, [accordingly the ALJ] frustrated the achievement of substantial justice." K-Mart Corp, 679 P.2d at 562 (citation omitted).

III. CLAIMANT'S RIGHT TO SUBPOENA WITNESSES

Respondent argues that "[i]t appears the claimant contents the word 'Shall' as used in § 63-46b-7(2) creates a liberty interest in the right to have subpoenas issued in administrative hearings." Resp't's Br. at 17. Respondent also argues that "claimant clearly has a due process right to present witnesses on his behalf, and have those witnesses subpoenaed if necessary." Id. at 18. Claimant agrees with Respondent's first statement, however, disagrees with its second. Section § 63-46b-7(2) does not support Respondent's second statement. Cf. Utah Code Ann. § 63-46-7(2) ("S]ubpeonas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party[.]"). There is no reference to "if necessary" in this section. The issuance is mandatory, not arbitrary.

Respondent also argues that "[i]t appears that claimant contends the word 'shall' as used in UCA § 63-46b-7(2) creates a liberty interest in the right to have subpoenas issued in administrative proceedings." Resp't's Br. at 17. In addition, it adds, "Counsel for Respondents could find no case law directly on point for this question." Id. Respondent then offers this Court's definition of liberty interest." Id. at 17-18. Claimant does not dispute that definition, but would like to supplement that definition.

"It is apparent from our decision that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty or property" as meant by the Due Process Clause." Paul v. Davis, 424 U.S. 693, 710 (1976). And, "[t]hese interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law [footnote omitted], and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or alter that protected status." Id. at 710-11.

In the instant matter, Claimant's interest in having subpoenas issued attained Constitutional status because his right to have subpoenas was initially recognized and protected by State law, that is, § 63-46b-7(2).

Respondent further argues that § 63-46-7(2) must read at the backdrop of § 63-46b-8(1)(a), "'which provides that the [p]residing officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions." Resp't's Br. at 18 (quoting § 63-46b-8(1)(a)). The two sections cited for the Respondent are different statutes. One applies to what is procedurally correct before a hearing has started. See § 63-46-7(2). The second applies to what is expected of an ALJ once the hearing is underway through the end of the hearing. See § 63-46b-8(1)(a), Respondent has placed the two statutes in the wrong order. The numerical order they were placed in Utah Code Ann. is a good starting point, that is, which statute should be applied first.

Respondent finally argues that "[i]t is difficult to see how the claimant was denied a right to have witnesses subpoenaed when he did not challenge the denial of subpoenas on the record, did not ask for subpoenas during the hearing, and waived his right by not objecting the denial of the subpoenas." Resp't's Br. at 19.

Respondent is attempting to place the burden on the Claimant. Section § 63-46-7(2) places the burden on the ALJ. Claimant asked for and was told, no. Resp't's Br. at 12. It is no different in a civil matter wherein a discovery request is

made, and a judge says well, that's okay, you do not need it and then you proceed with the hearing. On appeal, one of your appeal issues would be the denial of your discovery request. Respondent admits that such a request was made and that there was a denial of this request. Resp't's Br. at 12. How often does the request need to be made, and then be told no. "'In cases where the basic question is what does the law require? the standard is a correction of error standard.'" Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah App. 1991) (quoting Savage Indus., Inc. v. Utah State Tax Commission, 811 P.2d 664, 668 (Utah 1991)).

IV. WHETHER THE IRRELEVANT EVIDENCE ADMITTED CONSTITUTES AN ABUSE OF DISCRETION, OR ARBITRARY AND CAPRICIOUS

Claimant stands on the strength of this Opening Brief.

CONCLUSION

Based upon the foregoing, this Court should remand this matter back to the agency whereby Claimant can receive a fair and impartial hearing.

DATED this 21st day of November, 1996.

David L. Grindstaff
Attorney for Claimant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF THE PETITIONER** was **MAILED**, postage prepaid, on this 21st day of November, 1996 to:

Emma R. Thomas
K. Allan Zabel
Attorneys for Respondent
Board of Review of the Industrial Commission
Department of Employment Security
140 East 300 South
P.O. Box 45244
Salt Lake City, UT 84145-0244